

No. 87-920

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1987

NATALIE MEYER, in her official capacity as Colorado
Secretary of State, and
DUANE WOODARD, in his official capacity as Colorado
Attorney General,

v. *Appellants,*

PAUL K. GRANT, EDWARD HOSKINS,
NANCY P. BIGBEE, LORI A. MASSIE,
RALPH R. HARRISON, COLORADANS FOR FREE
ENTERPRISE, INC., a Colorado corporation,

Appellees.

REPLY BRIEF

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ARGUMENT

I.

REMAND OR CERTIFICATION OF THE NEWLY-RAISED STATE LAW ISSUE IS IMPROPER.

The amici, ACLU, suggest that this Court should remand this matter to address a state law issue which was not raised in the lower courts, or in the alternative, should certify the state law question to the Colorado Supreme Court. The state law issue concerns whether the legislature had the authority to pass the prohibition against payment of circulators. A remand or certification is inappropriate and would not serve the best interest of this Court, the litigants or the public.

The purpose of certification or remand is to save the time, energy and resources of the Court and to build cooperative judicial federalism. *Baird v. Bellotti*, 428 U.S. 132, 150-51 (1976). None of these goals will be met by either remand or certification. The appellants in this case were also defendants in a Colorado state court proceeding in which the authority of the legislature to pass the prohibition was an issue. The appellants herein also appealed the case to the Colorado Supreme Court. *Ford v. City of Commerce City, et al.*, Case No. 86-SA-459 (December 3, 1986). Undersigned counsel was also counsel of record in the state case. Over the objections of the appellants, the Colorado Supreme Court dismissed the case as moot. See *Grant v. Meyer*, 828 F.2d 1446, 1447 n.1 (10th Cir. 1987). Because the State Supreme Court has already rejected an opportunity to decide the issue, cooperative judicial

federalism would not be enhanced by a certification to that same court.

Moreover, a remand to the lower courts to decide an issue which was not raised until the amici brief would not save time, energy or resources. This case has been in litigation for almost 4 years. The appellants have devoted considerable time and expense to litigating this case on the issues framed by the appellees. A remand on an issue which the appellees did not raise would not save time, energy or resources. To the contrary, time, energy and resources would be wasted.

The cases cited by the ACLU are inapposite. In *Elkins v. Moreno*, 435 U.S. 647 (1978) and *Virginia v. American Booksellers Association*, 108 S. Ct. 636 (1988), the state law issues were presented to the lower federal courts and had not previously been presented to the state courts. In *Neese v. Southern Railway Co.*, 350 U.S. 77 (1955), the state law question had already been addressed by the lower federal court. In the case at bar, the state law issue was never raised in the federal courts, and the Colorado Supreme Court had already rejected an opportunity to review the state law issue.

II.

THIS CASE PRESENTS A QUESTION OF BALLOT ACCESS.

Both appellees and the ACLU misperceive the nature of this case. Almost all of the cases cited by both appellees and the ACLU address measures already on the ballot, *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) or payments to candidate,

Buckley v. Valeo, 424 U.S. 1 (1976). The case at bar is a ballot access case. One of the major issues in this case is what conditions the state may impose to ensure that the ballot measures have a significant modicum of support.

The distinction between ballot measures and ballot access is important. In ballot access cases, the Court has recognized that the state has a compelling interest in number of candidates regulating the ballot to avoid confusion, deception and frustration of the democratic process. *Munro v. Socialist Workers Party*, 107 S. Ct. 533, 537 (1986). The state has an even stronger interest in regulating the ballot access of initiative measures. Initiative measures are often complex pieces of legislation. Before initiative measures are presented to the electorate, the state has a right to ensure that the support is not skewed by the use of paid circulators who do not necessarily represent the scope of underlying support for the propositions that they are espousing.

One final point must be noted. The appellants have never argued that the petition circulators must stand mute. They may vociferously advocate the merits of the proposed measure. They may not be paid for their efforts, however.

III.

THE PROHIBITION ENHANCES THE INTEGRITY OF THE PROCESS.

The arguments of both appellees and the ACLU overlook a fundamental fact. In establishing the initiative process, the People of the State of Colorado gave to

the petition circulator the duty to affirm the validity of the signatures. The affirmation of the petition circulator converts the petitions into *prima facie* evidence that the signatures are genuine and true and that the persons signing the petition are registered electors. Colo. Const. art. V, sec. 1(6). Because the affirmation creates the legal presumption that the signatures are valid, the state has the right to establish standards which ensure that the creation of the legal presumption is free from taint. The petition circulator is both an advocate and a guarantor of the fairness and legitimacy of the signature-gathering process. The state has the right to regulate the petition circulator in his role as a guarantor of the process. *Pirincin v. Board of Elections of Cuyahoga County*, 368 F. Supp. 64, 71 (N.D. Ohio 1973), *aff'd mem.*, 414 U.S. 990, 94 S. Ct. 345, 38 L. Ed. 2d 231 (1973). The prohibition preserves both the integrity of the initiative process and the individual's confidence in government. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788-789 (1978). Given the unlimited methods of advocacy available, the prohibition is, at worst, *de minimis*.

CONCLUSION

The decision of the Tenth Circuit declaring the prohibition against payment of circulators to be unconstitutional must be reversed.

Respectfully submitted,

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